MAAP2014-P-0734-01
{3B62A72B-685E-4329-82E4-04A01575A3CD}
{154603}{309-141027:125444}{102014}

APPELLANT'S BRIEF

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH COUNTY

APPEALS COURT NO.
2014-P-0734

COMMONWEALTH,
Appellant

VS.

JOSEPH ROBERTS,
Appellee

ON APPEAL FROM JUDGMENTS OF
THE BROCKTON SUPERIOR COURT

BRIEF FOR THE COMMONWEALTH

TIMOTHY J. CRUZ,
District Attorney,
Plymouth District
CAROLYN A. BURBINE
Assistant District Attorney
BBO # 566840
32 Belmont Street
Brockton, MA 02301
(508) 584-8120
carolyn.a.burbine@state.ma.us

October 20, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

ISSUE PRESENTED

I. Whether the motion judge erred by granting the defendant's motion to withdraw his guilty plea based on the plea judge's failure to advise the defendant that he could face the possibility of civil commitment as a sexually dangerous person where (1) this is not per se reversible error, (2) the motion judge should have deemed the claim intentionally waived, and (3) the motion judge erred by relying on Padilla v. Kentucky and by predicting on this record that the defendant would indeed be a candidate for civil commitment?

STATEMENT OF THE CASE

The defendant was indicted by a Plymouth County Grand Jury on November 8, 2002. (R3) [1]. He was indicted on five counts of rape of a child under sixteen with force (indictments 3,4,5,8,9), four counts of rape of a child under sixteen (indictments 10,11,13,14), four counts of indecent assault and battery on a child under fourteen (indictments 1,2,7,12), and one count of assault and battery

[1] . The Commonwealth's record appendix will be cited as (R__). The guilty plea hearing transcript will be cited as (Tr__). The motion hearing transcript will be cited as MH__).

(indictment 6). (R1;16-29). On December 5, 2002, his bail was set at $35,000 cash. (R4). On July 7, 2003, bail was posted and the defendant was released. (R4). On February 2, 2005, the defendant pleaded guilty to the fourteen indictments after a colloquy. (R5).

Judge Delvecchio sentenced him that day to 9-13 years at MCI Cedar Junction on five counts of rape of a child by force and two counts of statutory rape, concurrent with each other (indictments 3,4,5,8,9,10,11). (R6). She sentenced him to 8-10 years at MCI Cedar Junction on three counts of indecent assault and battery on a child under fourteen, concurrent with each other and concurrent with the other sentences imposed (indictments 1,2,7). (R6). She sentenced him to 5 years of probation on one count of indecent assault and battery and two counts of rape of a child (indictments 12,13,14). (R6). The assault and battery conviction was placed on file (indictment #6). (R6).

On February 3, 2005, bail was returned. (R6). On February 9, 2005, defendant's plea counsel, Attorney Mancuso, filed a motion to revise and revoke the sentence on all of the convictions that carried a prison sentence (indictment #s 1-5,7-11). (R6). On

March 18, 2005, the defendant filed a pro se motion to revise and revoke the sentences on indictments 1-5 and 7-11. (R6). On April 1, 2005, Judge Delvecchio denied both motions. (R6). On April 21, 2005, the defendant filed a Notice of Appeal from the denial of his pro se motion to revise and revoke. (R6). The case was entered on the Appeals Court docket on April 25, 2005 (A.C. docket number 2005-P-0584). (R30). On July 19, 2005, the appeal was dismissed under Rule 17A for failure to file a brief or status report. (R30).

Over two years later, on October 11, 2007, the defendant, now represented by Attorney Korman, filed his first motion to withdraw his guilty pleas. (R8;31-36). Judge Walker[2] denied the motion on November 20, 2007 without a hearing. (R8;31). Judge Walker wrote the following ruling in the margin of the motion:

> "After review, the court finds that the defendant stated explicitly that his ability to understand the plea process on the date of the charge was not affected by his taking of medication (See full quotation, plea colloquy transcript, dated 2/2/05, page 6, line 21)[3]; Thus, the record

---

[2] Judge Delvecchio had retired.

[3] Judge Walker cited the following transcript passage. At page 6, lines 17-20, the judge asked the defendant, "And the medication that you've taken today, has it -- does it prevent you from being fully aware of what's happening today at this plea or understanding the

> establishes that the plea was tendered voluntarily, intelligently, and freely. The motion is DENIED." (R8;R31).

The defendant filed a Notice of Appeal on December 6, 2007. (R8). The defendant claimed on appeal that Judge Walker erred by denying his motion because he was not competent at the time of the plea colloquy, which rendered his guilty pleas involuntary. On January 22, 2009, after oral argument, the Appeals Court upheld Judge Walker's ruling in an unpublished decision, Commonwealth v. Roberts, 73 Mass. App. Ct. 1116 (2009)(unpublished 1:28 decision)(R37). The Appeals Court ruled that the record reflected that the defendant,

> "stated his belief that his medications did not affect his ability to understand the proceedings, responded appropriately to the judge's questions, asked questions when he did not understand, and informed the judge that he understood the charges and the consequences of pleading guilty. Moreover, the defendant demonstrated his ability to consult with his attorney, doing so three times over the course of the plea colloquy." Id.

The defendant filed a petition for further appellate review on February 5, 2009, which was denied on April 1, 2009. (R39).

---

consequences of it?" At line 21, the defendant answered, "I don't believe so, no." (Tr.6).

On October 13, 2009, the defendant, pro se, filed a second motion to withdraw his guilty plea and for a new trial, a motion for an evidentiary hearing, a motion for appointment of counsel and accompanying documents. (R9). On December 14, 2009, the court ordered CPCS to appoint counsel for the defendant. (R9). On May 18, 2010, represented by Attorney Kempthorne, the defendant filed an "Amended Motion to Withdraw Plea and for New Trial," replacing the motions he filed in October of 2009. (R10;R40-62). On August 24, 2010, the Commonwealth filed a memorandum in opposition to the defendant's motion. (R10;103-149). On November 1, 2010, Judge Connor conducted an evidentiary hearing on the motion, and took it under advisement. (R10).

On January 18, 2011, the defendant filed a motion to withdraw his pending "Amended Motion to Withdraw Plea and for New Trial." (R10;R150-151). On March 7, 2011, Judge Connor conducted a hearing on that motion. (R11). Judge Connor granted the defendant's motion that day without prejudice after finding a knowing, intelligent, and voluntary withdrawal by the defendant. (R11). Attorney Kempthorne withdrew as counsel on April 21, 2011. (R11).

On February 10, 2012, the defendant filed a pro se motion for the appointment of counsel for an evidentiary hearing and a new motion to withdraw plea and for a new trial. (R11;R152-153). On February 21, 2012, the matter was referred to CPCS for screening purposes. (R11). On March 15, 2012, Attorney Kempthorne filed another appearance. (R11). On October 17, 2012, she filed a status report and renewed motion to withdraw the defendant's guilty plea and for a new trial. (R11;R154-155).

On May 2, 2013, Judge Veary conducted a hearing on the defendant's renewed motion. (R11). He ordered a copy of the transcript of the previous evidentiary hearing before Judge Connor. (R11). On September 6, 2013, Judge Veary conducted a status hearing at which the parties, after reviewing the transcript of the evidentiary hearing before Judge Connor, agreed that no new or additional evidentiary hearing was necessary. (R11;Transcript status conference dated 9/6/13 p.3-13). On December 27, 2013, Judge Veary heard the parties' arguments and took the matter under advisement. (R12).

On January 2, 2014, Judge Veary allowed the defendant's motion to withdraw his guilty plea and for

a new trial and issued a memorandum of decision. (R12;R156-164). On January 13, 2014, the Commonwealth filed a Notice of Appeal. (R12;R165). The defendant was ordered to recognize in the sum of $10,000.00 cash, and conditions of recognizance were established. (R12). On March 13, 2014, the defendant was admitted for bail, and the conditions of his release were set with amendments. (R13). The case was docketed in the Appeals Court on May 14, 2014. (R13).

STATEMENT OF FACTS

The plea hearing before Judge Delvecchio

The plea hearing before Judge Delvecchio commenced with the clerk informing the judge that the defendant had submitted a written Waiver of Rights form. (Tr3). The defendant indicated that he wanted to change his pleas from not guilty to guilty. (Tr3). The judge informed the defendant that before she could accept his pleas, she had to ask him certain questions in order to determine whether his pleas were voluntary and whether he fully understood the consequences of pleading guilty. (Tr4). She told him that if he did not understand her questions at any time, he was to tell her. (Tr4).

The judge engaged the defendant in a colloquy. She established the defendant's name, that he was 33 years old, and that he had completed his college education. She asked the defendant whether he had ever been treated for a mental condition, and the defendant answered, "Yes." The judge asked what the condition was. The defendant answered, "I have a few. Post-traumatic stress disorder." He said he had "a few others" but couldn't remember the names. (Tr5).

The judge then asked, "Are you aware of any mental illnesses that you may now have?" (Tr5). The defendant answered, "Yes" and the judge asked what they were. (Tr5). The defendant answered, "[L]ike I said there's -- I have a few. There's post-traumatic stress disorder, bipolar, I have some other condition I can't think of." (Tr5-6). The judge asked him if he was currently being treated for these illnesses, and the defendant responded, "Yes. I take some medication." (Tr6).

The judge asked him if he had "taken any medication today," and the defendant answered that he had taken some earlier. The judge asked the defendant if he was under the influence of any drug, and the defendant answered, "No." The judge then asked, "And

the medication that you've taken today. . . does it prevent you from being fully aware of what's happening today at this plea or understanding the consequences of it?" The defendant answered, "I don't believe so, no." The judge said, "Okay. So you don't -- you are fully aware of what's happening?" The defendant answered, "Yes." The judge asked the defendant if he was under the influence of alcohol, and he said he was not. (Tr6).

The judge then read the first two indictments, one at a time, and asked the defendant after she read each one if he was aware of that particular indictment. The defendant acknowledged he was aware of these indictments, and then told the judge he "just had a question." The judge asked, "Yes?" The defendant asked if he should ask his lawyer the question, and the judge said he should. The record indicates that the defendant then consulted with his counsel. The defendant's attorney then asked the judge to continue. (Tr7).

The judge read the remaining 12 indictments, pausing after each one to ask the defendant whether he was aware of that indictment. (Tr7-11). The defendant consistently indicated that he was aware of

each indictment. (Tr7-11). The judge asked the defendant if he realized he was pleading guilty to each and every indictment and he answered affirmatively. (Tr11).

The judge established that there was no agreed-upon plea. (Tr11). The prosecutor made his recommendation.[4] (Tr12). The judge told the defendant that she would not impose a sentence that exceeded the terms of the prosecutor's recommendation without first giving the defendant an opportunity to withdraw his guilty pleas, and asked the defendant if he understood. (Tr12). The defendant said he did not, and the record shows that the defendant again conferred with counsel. (Tr12-13). The defendant then told the judge that he understood. (Tr13).

The judge then asked the defendant if he understood that by pleading guilty he was giving up his absolute right to a fair and impartial trial to determine his guilt or innocence, with or without a

---

[4] The prosecutor recommended that the defendant serve 10-20 years in state prison on the rape counts, and that the judge impose 5 years of probation from and after the completion of the state prison sentence on the remaining charges. He asked that the defendant register with SORB, undergo sexual offender counseling, and that he stay away from and have no contact with the three victims. (Tr12).

jury, and the defendant answered affirmatively. (Tr13). He also averred that he knew he was giving up his right to face his accusers, question them and other witnesses, and present evidence in his own defense. (Tr13). He stated that he understood he was giving up his right to exercise his privilege against self-incrimination and his right to appeal from any motions to suppress. (Tr13). The clerk informed the judge, upon her request, that the maximum penalty for a rape conviction was life, the maximum penalty for a conviction for an indecent assault and battery on a child under fourteen was 10 years, and that the maximum penalty for an assault and battery conviction was 2 1/2 years. (Tr14).

The prosecutor stated the following facts. (Tr14). The indictments arose from the defendant's conduct from 1996 through 2000, when he was in his mid-twenties. There were three female victims. The incidents occurred when A.R. was 10 through 12 years old and M.R. was 5 through 8 years old. A.R. and M.R. were the defendant's step-daughters. The incidents involving the third victim, L.S., occurred when she was 12 through 14 years old. (Tr14).

The defendant lived with A.R., M.R., and their mother. (Tr14). In August of 2002, A.R., the oldest step-daughter, told her mother that the defendant made her perform oral sex on him. (Tr14). This led to a police investigation. (Tr15). A.R. indicated that around February of 1997, she was on the couch when the defendant got on top of her and rubbed her vagina on top of her underwear. He told her not to tell her mother, and bought her candy and a magazine. (Tr15).

Two months later, the defendant took her pants off, licked her vagina and penetrated her, despite her attempts to get him to stop. (Tr15-16). During this time period, the defendant showed her porn videos, masturbated in front of her, and ejaculated. (Tr16).

The defendant progressed to forcing her to perform oral sex on him while he watched porn. (Tr16). One time, he told her she had to perform oral sex on him because she had spilled milk in his car. (Tr16). The defendant would get on top of her and "hump her" while they were clothed and ejaculate. (Tr16-17). Once, the victim was on the bed and the defendant had her on her stomach. (Tr17). She felt a tremendous pain in her anus consistent with his inserting his penis or his finger into it. (Tr17).

A.R. denied there was any vaginal intercourse during her first interview. However, she later revealed that when she was 13, the defendant penetrated her vaginally with his penis. He told her numerous times not to her mother or anyone else. (Tr17).

The younger sister, M.R., told authorities that the defendant abused her from the ages of 5 to 8. He showed her porn movies. When she was five, he began touching her chest area and vagina. He asked her to touch him, and ultimately asked her to perform oral sex on him for $3.00. (Tr18). When she was seven years old, the defendant told her she had an infection in her vagina and he needed to put medicine on it. He touched her vagina. She did not see any medicine, and had no reason to think she had an infection. (Tr18).

The third complainant was L.S., who believed she was in a consensual relationship with the defendant beginning when she was 12. He would excuse her from school and she had sexual relations with him numerous times. Other witnesses said that she would come to school and their homes with red marks indicating someone had sucked on her neck. (Tr19).

When the prosecutor finished, the defendant acknowledged that he had heard the facts stated to the

court. (Tr19-20). The judge asked him, "Did you, in fact, commit the acts stated to this court?" and the defendant answered affirmatively. (Tr20). The judge asked, "You understand that by pleading guilty you admit that the facts told to the court just now are true? You have to say it." (Tr20). The defendant answered, "Yes, Your Honor." (Tr20).

The judge asked the defendant, "Are there any facts you say differ?" and the defendant answered, "I don't want to upset the court, Your Honor." (Tr20). The judge assured the defendant that he was not upsetting the court. (Tr20). She told him to talk to his lawyer first, and then tell her what, if any, facts were different. (Tr20). The record shows that the defendant conferred with counsel. (Tr20). Defense counsel then told the judge that there was nothing substantial that the defendant had to add that would affect the charges. (Tr20). The judge asked, "Are there any substantial facts that you say differ?" and counsel responded, "No, not in substance, Your Honor, no." (Tr20-21).

The judge asked the defendant if he was pleading guilty willingly, freely, and voluntarily, and he answered, "Yes." The defendant told the judge, in

response to her questions, that no one had forced him to plead guilty, no threats had been made to induce him to plead guilty, and that he had had enough time to fully discuss his case, rights, defenses, and the possible consequences of this guilty plea with his attorney. The defendant averred that he felt his lawyer acted in his best interests and that he had been fairly represented by his attorney. (Tr21).

The judge asked the defendant if he was "in any way confused by the questions" she had asked, and he answered in the negative. (Tr21). The judge asked, "As I understand it, you are pleading guilty because you are guilty and for no other reason; is that correct?" and the defendant answered affirmatively. (Tr22). The defendant was advised of his rights if he was a non-citizen. (Tr22). The judge stated, "I do find that your plea is made voluntarily with knowledge of its consequences and I accept it." (Tr22).

The judge asked the defendant if he understood that by pleading guilty, he may have to register as a sex offender in the state or in any state in which he resided, and he answered in the affirmative. (Tr22). The judge asked the defendant if he understood he would be subject to "lifetime probation parole" and

the defendant answered, "Yes." (Tr22). The judge asked him if he understood he would have to provide a DNA sample and he answered, "Yes." (Tr23).

Defense counsel requested a term to be served of 6-10 years, with a "lifetime parole probation situation." (Tr23). He told the judge that the defendant was 33 years old, married, and was studying to become a minister. (Tr23). He told the judge that the defendant had three young children, one of whom was 60 days old. (Tr23). He stated that going to work was a hardship for the defendant's wife, and that the defendant's mother and grandmother were in the courtroom. (Tr23-24). Defense counsel said that he had had "lengthy discussions with the family regarding the defendant's medical condition, his mental condition," and his treatment. (Tr24).

Defense counsel noted that the defendant had been evaluated at Bridgewater State Hospital and had remained there afterwards. (Tr24). There was some confusion one day in his transport from the court back to the hospital and the defendant ended up in Plymouth. The Plymouth authorities would not return him to the hospital, and the defendant made seven suicide attempts because he was having problems with

the other prisoners. (Tr24). Defense counsel asked that the defendant make a notation on the mittimus that the defendant should be sent to Bridgewater State Hospital so that he could get the treatment and medication that he needed. (Tr24-25).

The judge announced the sentence. On indictments 3,4,5,8,9,10, and 11, she sentenced the defendant to 9-13 years concurrent in state prison. (Tr26). On indictments 1,2, and 7, she sentenced him to 8-10 years, concurrent with each other and concurrent with the previously announced sentence. (Tr26). On indictments 12,13, and 14, she sentenced him to 5 years of probation upon his release. (Tr26-27). She ordered him to participate in sex offender treatment, to register as a sex offender, to provide a DNA sample, and notified him that he would be subject to lifetime parole. She told the defendant that if he violated the conditions of his probation, he would be subject to the maximum penalty as prescribed by law. (Tr27). She asked the defendant if he understood, and he answered affirmatively. (Tr27).

<u>The evidentiary hearing on the second motion for a new trial before Judge Connor</u>

The defendant and his mother, Marilyn LaFontaine, testified at the hearing. The defendant testified that he had been treated prior to his guilty plea in 2005 for post-traumatic stress disorder, "for bipolar, and for a physical condition which also is a psychological condition for congenital adrenal hyperplasia." (MH20,39,40). He was taking Neurontin, Serzone, and Lithium at the time of his guilty plea. (MH40). He was currently taking Lithium for post-traumatic stress disorder, Wllbutrin as a stabilizer, and Clonopin for anxiety. (MH40-41).

His first lawyer was private counsel, Attorney McCallum. (MH42). When he could not afford private counsel any longer, the court appointed Attorney Leonard. (MH42). The defendant was not dissatisfied with Attorney Leonard's representation. (MH43). However, Attorney Leonard had not handled many sex cases, and "people" in the house of correction said he should have private counsel. (MH43).

Ms. Lafontaine hired Attorney Mancuso to represent the defendant in April of 2003. (MH11). She met the attorney at the 99 Restaurant in Taunton. (MH11-12). The defendant was incarcerated. (MH13). Attorney Mancuso told her that he was going to get the

alleged victim's medical and school records, hire a private investigator, and the fee of $17,000.00 would include post-conviction work. (MH12). Ms. Lafontaine paid Attorney Mancuso $8,000.00 that day, with the balance due at the end of the case. (MH12).

The defendant met with Attorney Mancuso twice outside of court proceedings on February 1 and 2, 2005. (MH45-46). Their first meeting was at the Plymouth House of Correction, shortly after Mancuso was hired, when Attorney Mancuso "just popped in" and introduced himself. (MH46). In December of 2004 or January of 2005, the defendant met Attorney Mancuso at the Hilltop Steakhouse in Braintree when he was out on bail. (MH47). They ate lunch for thirty minutes and did not discuss his case at all. (MH48). Attorney Mancuso asked for the rest of his fee and the defendant refused to pay him. (MH49). Attorney Mancuso explained he had problems, and why there were miscommunications and missed meetings. (MH49-50).

The defendant tried to reach Attorney Mancuso by telephone over 60 times before the trial without success. (MH50-51). He left messages a few times when the voicemail was on. (MH51). His mother had the same experience. (MH13-14).

The defendant and his mother appeared in court six times for status and other reasons between the time Attorney Mancuso filed his appearance and December of 2004. (MH13-14,51-52). Attorney Mancuso never showed up. (MH52). Various judges warned the defendant that he had better have his attorney with him at the next date. (MH52). The defendant never received advance notice from Attorney Mancuso that the attorney would not be in court. (MH52-53). The court, however, usually received a phone call or a fax. (MH52). One time, the attorney was in a car accident. (MH52). Court personnel would "come in" and "the judge would give me another date." (MH52).

The defendant did not hire another attorney because his family had already paid Attorney Mancuso. (MH53). The defendant did not think that the court would provide him with another court-appointed attorney. (MH54). The defendant became "somewhat aware" that Attorney Mancuso was not ready for trial, given the continuances. (MH54). But Attorney Mancuso was promising "to get these things done." (MH54).

On February 1, 2005, the defendant went to the Brockton Superior Court. (MH55). His mother, his grandmother, his wife, and his friend were there as

well. (MH14,15,20,56). They were there all day. (MH15). The defendant thought they were there for a hearing; "a judge's or a lobby conference, whatever that means." (MH56). The defendant had so many people with him because "[i]t was the first time he was showing up in court. I hoped to get something done." "He said it was a hearing, first off, before the judge." The defendant thought his attorney could speak to his witnesses, "which were my mother, my grandmother, my wife." (MH56-57).

Attorney Mancuso spoke to the defendant in the hallway that day a couple of times, for about five minutes in total. (MH59). Attorney Mancuso said he was there on trial in another rape case. (MH15,16,20,57). He said he had over thirty witnesses in the case and he was "burned out." (MH16,57). Attorney Mancuso told the defendant that he had not hired a private investigator (even though he and the defendant had discussed this in Plymouth), and he had not filed the motions that they had talked about or interviewed the defendant's witnesses. (MH57-58). When they had met previously, Attorney Mancuso had told the defendant that he knew from Ms. Lafontaine what the defendant wanted done, and he was going to

get his file from his prior attorney. (MH59). That was why he and the defendant "never had a dialogue about my case." (MH59).

Attorney Mancuso told the defendant that he did not have the option of going to trial. (MH18,59). The defendant had to accept the plea that Mancuso had brokered. (MH18,59). Attorney Mancuso said that Judge Delvecchio was a friend of his, he knew her very well, and she was doing him a favor. (MH59). She was willing to do him a favor because she knew that he was losing this other case. (MH59).

The defendant told Attorney Mancuso that he thought the attorney was going "to do all this pretrial stuff." (MH60). Attorney Mancuso said he could not do it. (MH60). He told the defendant that this was what the judge was offering, and if he did not take the deal, the judge had marked the case for trial the following week. (MH60).

The defendant asked whether he could hire another attorney. (MH60). Attorney Mancuso told him that he could not. (MH60). The judge was not going to give him time to "get all this investigative stuff done." (MH60-61). He could go to trial the following week or take the plea. (MH61). Attorney Mancuso jotted the

plea down, and "it said 6 1/2 years." (MH61). The defendant said he wanted to go to trial. (MH61).

Attorney Mancuso responded, "Okay, Mr. Roberts, let me explain it to you," and he told the defendant to calm down. (MH61). "He took out his pad. He wrote it down. He said, 'What it means is 9-13.'" (MH61). Attorney Mancuso told him in "Massachusetts, they take off 1/3 of your sentence as soon as you go into prison . . . you only serve 2/3 of a sentence." (MH61-62). He told the defendant he would be out in 6 1/2 years and he would get parole. (MH62).

The defendant felt betrayed, and he was distraught and crying. (MH19,79). He felt that Attorney Mancuso was in a conspiracy with the judge to deprive him of his rights. (MH80-81). The defendant did not feel that he was getting a favorable outcome, even though he potentially faced multiple life sentences. (MH81-82). On cross-examination, the defendant admitted that he was afraid of getting multiple consecutive life sentences. (MH82).

Ms. Lafontaine and the defendant returned to the courthouse on February 2. (MH28). They were accompanied by friends and family because the plan on that day was for the defendant to plead guilty.

(MH28-29). Ms. Lafontaine and her mother never tried to fire Attorney Mancuso. (MH29). Ms. Lafontaine was present in the courtroom for the guilty plea colloquy. (MH34). However, she did not hear much of it because it was noisy. (MH34). At no point did she or anyone with her alert the judge to any concerns about Attorney Mancuso. (MH29-30).

That day, the defendant "went through it" again with Attorney Mancuso about ten times. (MH62). He would get 6 1/2 years and he would be guaranteed parole. (MH21,62). Attorney Mancuso never said anything about possible sexually dangerous person civil commitment. (MH18,21,63). The defendant did not learn of it until a fellow state prison inmate mentioned it to him. (MH63). He could not remember when this conversation occurred. (MH95).

The defendant had reviewed the transcript of his plea before Judge Delvecchio. (M63). He acknowledged that there were points during the plea where he asked his attorney for advice. (MH63). Attorney Mancuso did not explain sexually dangerous person commitment then. (MH63). Attorney Mancuso did advise him that he could face multiple life sentences if he did not

plead guilty. (MH63). The judge told the defendant about community lifetime parole. (MH63-64).

The defendant pleaded guilty out of fear of having no other option. (MH67). He did not tell Judge Delvecchio this because she was a personal friend of his attorney and he did not want to upset her. (MH67). His attorney told him not to deviate from what the attorney told him to say. (MH67).

The defendant knew that he was going to be sentenced, on the record, to 9-13 years. (MH68). He believed, however, that he would be paroled after 6 1/2 years, guaranteed. (MH30,68). He would not have pleaded guilty had he known that he would have to serve the full sentence and be potentially subject to civil commitment as a sexually dangerous person. (MH68). He learned that he would serve more than 2/3 of his sentence on his first night of his incarceration. (MH95).

On cross-examination, the defendant testified that he took his prescribed medication for mental illness on the night before and the morning of the plea. (MH83-84). He took more that morning than he needed, and he also had a couple of beers at 7:30 A.M. (MH84,85). This might have affected his ability to

think clearly four hours later when he pleaded guilty. (MH86). Ms. Lafontaine testified that she did not have any knowledge that the defendant was taking anything other than the proper dosage. (MH32-33).

The judge asked the defendant a lot of questions during the colloquy and he understood them. (MH88). He told her that he had taken his medications earlier that day. (MH88,89). He also told her that he was not under the influence of any drugs or alcohol. (MH88, 89-90). He told the judge that his medication did not prevent him from being fully aware of what was happening at the hearing, or in his understanding of the consequences of the plea. (MH90).

The defendant acknowledged that the judge told him what the different charges against him were, individually. (MH90). He did not remember his lawyer stating that there was no agreed upon plea, but it is in the transcript. (MH90). He remembered that the prosecutor made a different sentencing recommendation. (MH91). The prosecutor recommended a 10-20 year sentence with probation from and after. (MH91). The judge told the defendant that she would not impose a sentence that exceeded his attorney's recommendation without giving him a chance to withdraw his guilty

plea. (MH91). He did not dispute that the judge advised him that he had a right to a jury trial, to face his accusers, present evidence on his behalf, exercise his right against self-incrimination and other rights. (MH92). The prosecutor read the facts in court. (MH93).

At that point, the defendant said to the judge that he did not want to upset the court, but he wished to speak to his attorney. (MH94). The defendant testified that he then told his attorney that he did not want to go ahead with the plea, and his attorney told him he had to do so. (MH94). The transcript indicates that at that point, Attorney Mancuso told the judge that there was nothing substantial that the defendant had to add that would affect the charges in any way. (MH94). The defendant did not dispute that assertion when made. (MH94). He was afraid of the conspiracy. (MH95).

The defendant did not understand what the judge meant by "if I objected to either disposition, that I had the right, or something along those lines" and he did not understand lifetime community probation/parole. (MH98). However, he did not tell the judge so she could explain these concepts to him.

(MH98). Lifetime community parole was later stricken from his sentence. (MH98).

Judge Delvecchio may have said that he could talk to his lawyer and then tell her what facts he said were different. (MH99). But the judge seemed "flustered" and he did not want to "push her indulgence here." (MH100). The defendant acknowledged that he did not claim in his affidavit in the case at bar that he was afraid of Judge Delvecchio. (MH100).

Ms. Lafontaine and her mother met Attorney Mancuso eight days after the plea across the street from the courthouse to pay him. (MH22,33). She and her mother never discussed not paying him. (MH33). Ms. Lafontaine's mother paid him in cash from the bail refund on the condition that Attorney Mancuso go into the courthouse with her and file a motion to revise and revoke. (MH22-23).

The defendant testified that after he learned that he would not get out in 6 1/2 years, he wrote to Attorney Mancuso on February 4, 2005 and asked him to file a motion to revise and revoke. (MH69-70,83;(Rxx). The defendant acknowledged that Attorney Mancuso "swiftly" filed that motion. (MH83).

The defendant was provided with post-conviction counsel, Attorney William Korman, by CPCS. (MH72). The defendant testified that he told Attorney Korman about Attorney Mancuso's lack of trial preparation and the plea. (MH72). Attorney Korman was not willing to raise ineffective assistance of counsel, any "sexually dangerous person" or any constitutional issues in the defendant's first motion for a new trial. (MH96). Attorney Korman told the defendant that he would quit if the defendant forced the issue. (MH72). Attorney Korman "said that he wasn't willing to represent anything other than what he had written because he felt that it would weaken his case, that he picked what he felt was the strongest issue, and that if you add more things in a case -- this was just his opinion. That if you add more things into a case that it weakens it, so that he wasn't going to do that. That if I wanted to do that, then I would have to represent the case on my own." (MH97).

Attorney Korman raised a claim concerning the defendant's mental competence on the defendant's behalf. (MH72). The defendant did not fire Attorney Korman. (MH97). The defendant complained to CPCS, and the Committee's director told him that he had

spoken to Attorney Korman, and since the defendant had pleaded guilty, he was not entitled to counsel. (MH72-73). "Since I was not entitled to counsel, that Attorney Korman had decided to quit. They were not -- you have to have the letter, a matter of public report, that if Attorney Korman quit on me, they were not going to give me another attorney. So that I either had to accept the issues that he raised or be without an attorney." (MH73).

The defendant filed a complaint against Attorney Mancuso with the Board of Bar Overseers in December of 2005, and the BBO issued a public reprimand. (MH38,73;R74-85). The Board found that the defendant and his family had difficulty contacting Attorney Mancuso. (R75). "When the defendant or his family members were able to connect with the respondent's mobile telephone, they left messages for the respondent on his voice mail requesting that the respondent return their calls, but the respondent frequently failed to do so." (R75,81). Attorney Mancuso's mobile telephone, upon which he exclusively relied, was frequently out of service due to billing disputes with the mobile telephone provider. (R80). While Attorney Mancuso filed a motion to revise and

revoke, he did not notify the defendant of this filing. (R75). Attorney Mancuso did not respond to the defendant's post-conviction letters or visit him in jail. (R75). Attorney Mancuso was also reprimanded for giving the defendant his file six months after the BBO sent him a copy of the defendant's complaint. (R75). At the time of the hearing in the case at bar, Attorney Mancuso was incarcerated on an unrelated matter. (MH74-75).

No party has ever actually filed a petition to civilly commit the defendant. (MH96).

ARGUMENT

I. THE MOTION JUDGE ERRED BY GRANTING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA BASED ON THE PLEA JUDGE'S FAILURE TO ADVISE THE DEFENDANT THAT HE COULD FACE THE POSSIBILITY OF CIVIL COMMITMENT AS A SEXUALLY DANGEROUS PERSON WHERE (1) THIS IS NOT PER SE REVERSIBLE ERROR, (2) THE MOTION JUDGE SHOULD HAVE DEEMED THE CLAIM INTENTIONALLY WAIVED, AND (3) THE MOTION JUDGE ERRED BY RELYING ON PADILLA V. KENTUCKY AND BY PREDICTING ON THIS RECORD THAT THE DEFENDANT WOULD INDEED BE A CANDIDATE FOR CIVIL COMMITMENT.

The defendant pleaded guilty before Judge Delvecchio on February 2, 2005 to five counts of rape of a child under sixteen with force, four counts of rape of a child under sixteen, four counts of indecent assault and battery on a child under fourteen, and one

count of assault and battery. (R5). In his second motion to withdraw his guilty plea, the defendant made numerous claims regarding the sufficiency of his guilty plea colloquy before Judge Delvecchio and additionally claimed that his defense counsel was ineffective. (R40-99). The motion judge, Judge Veary, granted the defendant's second motion for a new trial solely on the basis that the defendant was never advised that, as a result of his guilty plea, he could become the subject of a petition pursuant to G.L. c. 123A to determine whether he was a 'sexually dangerous person' and, if so found, be confined to the Massachusetts Treatment Center for a term of one day to life. (R156-164).

Judge Veary found, regarding the plea hearing before Judge Delvecchio, that:

> "[n]one of the participants in their recorded remarks at the dispositional hearing made any mention of the possibility that the defendant, as a result of his plea that day, could become the subject of a petition pursuant to G.L. c. 123A urging that he be found to be a 'sexually dangerous person' and, if so found, that he could be confined to the Massachusetts Treatment Center for an indeterminate term of one day to life." (R159).

Judge Veary held that the case turned not only upon the wording of Rule 12(c)(3), but, as in Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473 (2010), on

the foreseeability of "grave and closely connected consequences." (R163). He ruled:

"This defendant during his plea colloquy asserted that he suffered from and was being medicated for at least two problematic mental conditions, and he then admitted to committing repeated sexual offenses against three children over a period of six years. The prospect of his consequently being named in a meritorious 'sexually dangerous person' petition was clearly discernable. And the statutory framework for that petition plainly presented the possibility of the defendant losing his physical liberty for his lifetime. Under that combination of circumstances, the defendant should have been advised on the record by the court, in accord with Rule 12(c)(3)(B), of his exposure to further confinement as a 'sexually dangerous person.' Moreover, in the absence of such advisement, the plea colloquy did not pass constitutional muster because it cannot be fairly said that the defendant made his plea 'with sufficient awareness of the relevant circumstances.' Both Rule 12(c)(3)(B) and constitutional due process accordingly require that the defendant be allowed to withdraw his guilty plea and to proceed to a new trial." (R163-164).

1. Waiver

Judge Veary should have deemed the defendant's claim deliberately and bindingly waived where the defendant considered but did not raise it in his first motion to withdraw his guilty pleas, which was filed by Attorney Korman.[5] Mass.R.Crim.P. 30. Post-conviction motions for a new trial based on grounds available but not raised on direct appeal or in previous motions for a new trial are waived.

[5] Attorney Korman was not trial counsel.

Commonwealth v. Gagliardi, 418 Mass. 562, 565 (1994). "The test for waiver is whether 'the theory on which [the defendant's] argument is premised has been sufficiently developed to put him on notice that the issue is a live issue.'" Commonwealth v. Amirault, 424 Mass. 618, 639 (1997) (citations omitted). Here, a review of the record indicates that the defendant's claims could have been raised at the time of his first motion for a new trial. See Commonwealth v. Hicks, 50 Mass. App. Ct. 215, 216 (2000)(judge properly denied defendant's second motion for a new trial on his second degree murder conviction on generally known and available issues that the defendant could have raised, but failed to raise, in his direct appeal or in his first motion for a new trial). The SDP statute was in effect, and the defendant was therefore on notice of the possibility that someone convicted of a sexual offense might face SDP commitment proceedings.

According to the defendant's testimony at the evidentiary hearing, Attorney Korman discussed with him the possibility of raising the sexually dangerous person civil commitment issue in the first motion for a new trial. (MH96-97). Attorney Korman said he would not raise it, but the defendant had the option

of raising the issue himself. (MH97). Thus, the defendant was put on notice that he could raise the issue on his own, and he chose not to do so. He made a tactical decision and should be held to it. See Commonwealth v. Randolph, 438 Mass. 290, 298 (2002)(if the court can infer that a defendant's failure to raise a claim at an earlier date was a calculated tactical decision, there is no substantial risk of a miscarriage of justice); Commonwealth v. Sowell, 34 Mass. App. Ct. 229, 233-234 (1993)(insufficient showing of unreasonable choice by appellate counsel). The defendant's claim should have been deemed waived.

2. It is not per se reversible error for a plea judge to fail to advise a defendant of the possibility of civil commitment as a sexually dangerous person, the judge's Padilla v. Kentucky analogy is without merit, and it was error for the judge to predict that the defendant would indeed be a candidate for civil commitment proceedings and factor that into his decision. A review of the plea colloquy shows that the guilty plea was made knowingly, voluntarily and intelligently, despite the omission.

The standards governing withdrawal of a guilty plea are well established. Commonwealth v. Furr, 454 Mass. 101, 107-108 (2009). "A post-conviction motion to withdraw a plea is treated as a motion for a new trial." Commonwealth v. Bowler, 60 Mass. App. Ct. 209, 210 (2003). Accordingly, a judge should only

grant the defendant's motion to withdraw a guilty plea if it appears that justice may not have been done. Id. Judges are to apply the standard set out in Rule 30 rigorously, and "should only grant a post sentence motion to withdraw a plea if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth." Commonwealth v. Nikas, 431 Mass. 453, 456 (2000) citing Commonwealth v. DeMarco, 387 Mass. 481, 486-487 (1982).

The defendant claimed in his motion that, pursuant to Rule 12, the trial judge was required to advise him that if he pleaded guilty, he faced the possibility of civil confinement as a sexually dangerous person pursuant to G.L. c. 123A. (R40). As a result, he asserts, his plea was not voluntary or intelligent as a matter of law. (R41). Mass.R.Crim.P. 12(c)(3) states that "where appropriate," the judge shall inform the defendant "of any different or additional punishment based upon subsequent offense or sexually dangerous persons provisions of the General Laws, if applicable; where applicable, that the defendant may be required to register as a sex offender; and of the mandatory

minimum sentence, if any, on the charge." Mass.R.Crim.P. 12(c)(3).

The judge did not advise the defendant that he may face the possibility of civil commitment as a sexually dangerous person. The failure to refer to the possibility of future civil commitment in a plea colloquy does not per se render an otherwise valid guilty plea invalid. See Commonwealth v. Murphy, 73 Mass. App. Ct. 64, 66-67 (2008)(judge's failure to advise defendant of minimum and maximum possible sentences in colloquy as required by rule 12 did not automatically entitle defendant to withdraw guilty plea). Certain specifics mandated by the rule, including that the defendant be informed of possible consequences under G.L. c. 123A, are not constitutional requirements. See Commonwealth v. Nolan, 16 Mass. App. Ct. 994, 994 (1983); Commonwealth v. Perez, 71 Mass. App. Ct. 1103 (2008)(unpublished 1:28 decision). Rather, failure to give a civil commitment advisement is a collateral and/or contingent consequence. See Commonwealth v. Albert A., 49 Mass. App. Ct. 269, 271 (2000)(requirement of registration as a sex offender is a collateral and contingent consequence of plea), Commonwealth v.

Shindell, 63 Mass. App. Ct. 503, 504-505 (2005)(failure to advise defendant that conviction requires registration as sex offender does not invalidate plea), Commonwealth v. Santiago, 394 Mass. 25, 30 & n.6 (1985)(requirements for and limitations on parole considered contingent consequences); Commonwealth v. Lynch, 61 Mass. App. Ct. 1124, 1124 and n.3 (2004)(unpublished 1:28 decision) citing Steele v. Murphy, 365 F.3d 14, 17-19 (2004)(1st Cir.) (concluding possibility of commitment for life as a sexually dangerous person is a collateral consequence of pleading guilty: 1st Circuit cited Mass.R.Crim.P. 12(c)(3)(B) at page 19, n.2 but concluded that failure to follow this state procedural rule did not affect its analysis of Steele's federal constitutional claim).

A sexually dangerous person proceeding under G.L. c. 123A is a civil proceeding, not a criminal one. G.L. c. 123A. Civil commitment is not an "additional punishment," but rather a means for the sexually dangerous to receive needed treatment. Persons committed under the statute are committed to a treatment center providing for their "care, custody, treatment, and rehabilitation" and continues for only

as long as continued treatment for the benefit of the person and the public is required. Commonwealth v. Bruno, 432 Mass 489, 500 (2000). Civil commitment, with the opportunity afforded to the offender to petition each year for release, is therefore not a punitive measure. Id. at 500-501.

Judge Veary's analogy to Padilla v. Kentucky is inappropriate. "In Padilla, the United States Supreme Court did not rule on the distinction between direct and collateral consequences, as its decision was limited to the 'unique nature of deportation.'" Commonwealth v. Lenkowski, 84 Mass. App. Ct. 1121, 1121 (2013)(unpublished 1:28 decision) citing Padilla v. Kentucky, supra at 365. In Padilla, the critical feature concerning immigration in the Court's view is that in particular circumstances, the result of any deportation proceedings is virtually inevitable. Commonwealth v. DeJesus, 468 Mass. 174, 175 (2014). In such circumstances, if counsel fails to provide a defendant with accurate advice concerning the deportation consequences of a guilty plea, counsel's representation falls below an objective standard of reasonableness. Id. at 174, citing Commonwealth v. Sylvain, 466 Mass. 422, 438 (2013).

Judge Veary additionally erred by finding that the prospect of the defendant being found a "sexually dangerous person" was "clearly discernable" because the defendant asserted that he had and was being medicated for at least two problematic mental conditions and admitted to committing repeated sexual offenses against three children over a period of six years. For the judge, these circumstances at the time of the plea hearing presented the possibility of the defendant losing his physical liberty for his lifetime. The situation in the case at bar is a far cry from that in Padilla, where the Court regarded deportation as essentially mandatory under the law.

Here, the defendant's potential civil commitment as a sexually dangerous person is nowhere near mandatory. For the defendant to be civilly committed, first, the District Attorney's Office would have to decide to file a petition. G.L. c. 123A, § 12(b). Then the court would hold a hearing to determine whether there was probable cause to believe the defendant is sexually dangerous person. G.L. c. 123A, § 12(c). If probable cause were found, qualified examiners would prepare reports regarding the defendant. G.L. c. 123A, § 13. Should the District

Attorney's Office decide to proceed to trial, the prosecutor would have the burden of proving every element. G.L.c. 123A, § 14. This is complex process, and its result is by no means a foregone conclusion.

The Appeals Court's decision in Commonwealth v. Davis, 78 Mass. App. Ct. 1119 (2011)(unpublished 1:28 decision) is instructive. In Davis, the motion judge advised Davis that by pleading guilty, the Commonwealth could move in a subsequent proceeding to have him declared a sexually dangerous person. Id. However, the judge did not inform the defendant that the term of such a commitment is one day to life. Id.

The Appeals Court held that, in order to pursue sexually dangerous person commitment proceedings against the defendant, the Commonwealth would have to show the defendant committed a sexual offense as defined by G.L. c. 123A, § 1, which could be met by Davis's guilty pleas to one count of indecent assault and battery and three counts of aggravated rape. Notably, the Commonwealth would additionally have to show that "at the time of the [sexually dangerous person] proceedings, the defendant 'suffers from a mental abnormality or personality disorder which makes [him] likely to engage in sexual offenses if not

confined to a secure facility.'" Id. citing G.L. c. 123A, § 1. There was nothing in the record suggesting that Davis met that definition. Commonwealth v. Davis, supra. As a result, the possibility of a sexually dangerous person proceeding against Davis was at that point purely speculative, and any violation of Rule 12 required no further analysis. Id. See Steele v. Murphy, supra at 18 (although the charges against Steele consisting of seven counts of aggravated rape, assault and kidnapping perhaps made him a likely candidate for being classified a sexually dangerous person, his classification as one was not a direct, immediate, or largely automatic result of pleading guilty).

In fact, there was not sufficient evidence in the record before Judge Veary to suggest that the defendant met the definition of a sexually dangerous person under the statute at the time of the hearing on his motion to withdraw his guilty plea, let alone to indicate that he would meet the definition in the future, should he ever actually be subject to such a civil commitment hearing. There is nothing in the record establishing that the conditions the defendant claimed to suffer from, i.e., post-traumatic stress

disorder, bipolar disorder, and congenital adrenal hyperplasia constitute a mental abnormality or personality disorder which would make the defendant likely to engage in sexual offenses if not confined to a secure facility. The judge erred by holding that civil commitment was essentially a "given" here.

The question concerning the validity of the defendant's plea turns on, notwithstanding the omission of the reference to the prospect of a future sexually dangerous person proceeding, whether the defendant's pleas were tendered in a knowing, voluntary, and intelligent manner. Commonwealth v. Murphy, supra at 63; Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572, 580 (2001). A reviewing court "'will not assume that the defendant's plea was involuntary and unknowing and say as a matter of law that justice was not done simply because the record reflects noncompliance with rule 12.'" Commonwealth v. Murphy, supra quoting Commonwealth v. Rodriguez, supra at 580-581; Commonwealth v. Nolan, 19 Mass. App. Ct. 491, 495 (1985). "'[W]hile compliance with the procedures set out in rule 12(c) is mandatory, adherence to or departure from them is but one factor to be considered in resolving' whether a plea was

knowingly and voluntarily made." Commonwealth v. Rodriguez, supra at 580 quoting Commonwealth v. Johnson, 11 Mass. App. Ct. 835, 841 (1981); Commonwealth v. Murphy, supra.

Here, the defendant's claim rests entirely on the credibility of his belated and uncorroborated testimony at the motion hearing that directly conflicts with the defendant's sworn statements at the guilty plea hearing. See Commonwealth v. Hiskin, 68 Mass. App. Ct. 633, 640 (2007). It is noteworthy that the defendant did not raise this claim in his first motion for a new trial. Further, a full review of the record shows that the colloquy provided "basic assurances that the defendant, represented by counsel, with whom he has consulted, is free of coercion or the like, understands the nature of the crimes charged, knows the extent of his guilt, recognizes the basic penal consequences involved, and is aware that he can have a trial if he wants one." See Commonwealth v. Bowler, supra at 213 citing Commonwealth v. Dozier, 24 Mass. App. Ct. 961, 961 (1987) citing Commonwealth v. Nolan, 19 Mass. App. Ct. 491, 498-499 (1985); See Commonwealth v. Hiskin, supra at 641 (nothing in the plea colloquy or the extraneous materials submitted by

the defendant detracts from the conclusion that the guilty plea was voluntary and the product of deliberate and rational decision-making); See Commonwealth v. Hiskin, supra at 640 citing Commonwealth v. Wheeler, 52 Mass. App. Ct. 631, 635 (2001) (defendant's sworn statements must not be discarded on the later assertion that he had his fingers crossed).

It is appropriate to take into consideration that the defendant was represented by counsel throughout the proceedings. Commonwealth v. Murphy, supra at 67. See Commonwealth v. Hoyle, 67 Mass. App. Ct. 10, 13 (2006); See Commonwealth v. Russell, 37 Mass. App. Ct. 152, 157 (1994) (representation and consultation with counsel are significant factors in determining whether a guilty plea, not accompanied by a specific recitation of the defendant's intra-trial rights was, nonetheless, knowingly and voluntarily made). The defendant claimed that his trial counsel did not inform him of the possibility of SDP civil commitment. The defendant did not produce an affidavit from plea counsel supporting this allegation. Commonwealth v. Hoyle, supra (noting that affidavit from defense counsel was conspicuously absent). In fact, the

defendant's claim is refuted by plea counsel's averment in the Waiver of Rights form that he advised the defendant of all of the matters within Rule 12, including the consequences of guilty pleas. (R99-100). While the judge still should have issued the advisement, this factor calls the defendant's credibility into question. While the defendant claimed in his second motion to withdraw his plea that trial counsel was ineffective, Judge Veary did not make any such finding.

It is important to note that the defendant was an active participant in the hearing and did not hesitate to speak up when he had a question or a comment. This contradicts his testimony at the evidentiary hearing that he believed he could not talk to the judge about his concerns at the hearing. At the beginning of the hearing, after the judge read the first two indictments and the defendant said he was aware of them, the defendant told the judge he had a question. (Tr.7). The judge asked, "Yes?" and the defendant asked if he should ask his lawyer the question. (Tr.7). The judge told him that he should, and he consulted with his lawyer. (Tr.7).

After the judge told the defendant that she would not exceed the prosecutor's sentencing recommendation without giving the defendant the opportunity to withdraw his pleas, she asked him if he understood. The defendant said that he did not and again consulted with counsel. (Tr.12-13). Lastly, during sentencing discussions, defense counsel stated that the defendant had become a minister, but later informed the judge that the defendant had corrected him: the defendant was studying to be one. (Tr.23,25).

Judge Delvecchio established through the defendant's answers that the defendant was pleading guilty willingly, freely, and voluntarily. (Tr.21). The defendant told the judge, in response to her questions, that no one had forced him to plead guilty, no threats had induced his plea, and he had had enough time to discuss his case, rights, defenses, and the possible consequences of this guilty plea with his attorney. (Tr. 21). The defendant said that he felt his lawyer acted in his best interests and that he had been fairly represented by his attorney. (Tr.21).

The judge asked the defendant if he was "in any way confused by the questions" she had asked, and he answered in the negative. (Tr.21). The judge asked,

"As I understand it, you are pleading guilty because you are guilty and for no other reason; is that correct?" and the defendant answered affirmatively. (Tr.22). The judge stated, "I do find that your plea is made voluntarily with knowledge of its consequences and I accept it." (Tr.22).

The defendant received a very favorable sentence given the nature and number of the offenses charged and in the light of the potential for multiple life sentences, and this must be given weight in any consideration of his desire to plead guilty. See Commonwealth v. Murphy, supra at 67 (defendant must provide plausible evidence that he would have preferred to go to trial and face minimum mandatory of 20 years and maximum sentence of life if found guilty); Commonwealth v. Hiskin, supra at 642. Where the record shows that the defendant's guilty plea was knowing, voluntary, and intelligent, it must be upheld. "[A] defendant's sworn statements during a guilty plea colloquy are statements of consequence and not mere conveniences later to be discarded. While not alone determinative of whether the defendant's guilty plea is intelligent and voluntary, the defendant's statements at colloquy have undeniable

bearing and heft in considering a later claim to the contrary." Id. at 634.

Under Padilla, upon which Judge Veary relied, a defendant has to additionally establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Commonwealth v. DeJesus, supra at 182-183. Judge Veary did not state in his ruling that he credited the defendant's claim that, had he received the advisement, he would not have pleaded guilty. The record shows that the defendant's guilty plea was knowing, voluntary, and intelligent, and that the defendant received an extremely favorable sentence instead of potential consecutive life sentences, a possibility the defendant acknowledged he had feared.

CONCLUSION

For the above stated reasons, the Commonwealth respectfully requests that the Court reverse the judge's decision granting the defendant's second motion to withdraw his guilty plea and for a new trial.

Respectfully submitted,
TIMOTHY J. CRUZ
District Attorney

BY: Carolyn A. Burbine
CaCarolyn A. Burbine
Assistant District Attorney
For the Plymouth District
BBO # 566840

October 20, 2014

COMMONWEALTH'S ADDENDUM

Print

PART I ADMINISTRATION OF THE GOVERNMENT

TITLE XVII PUBLIC WELFARE

CHAPTER 123A CARE, TREATMENT AND REHABILITATION OF SEXUALLY DANGEROUS PERSONS

Section 1 Definitions

Section 1. As used in this chapter the following words shall, except as otherwise provided, have the following meanings:—

"Agency with jurisdiction", the agency with the authority to direct the release of a person presently incarcerated, confined or committed to the department of youth services, regardless of the reason for such incarceration, confinement or commitment, including, but not limited to a sheriff, keeper, master or superintendent of a jail, house of correction or prison, the director of a custodial facility in the department of youth services, the parole board and, where a person has been found incompetent to stand trial, a district attorney.

"Community access board", a board consisting of five members appointed by the commissioner of correction, whose function shall be to consider a person's placement within a community access program and conduct an annual review of a person's sexual dangerousness.

"Community Access Program", a program established pursuant to section six A that provides for a person's reintegration into the community.

"Conviction", a conviction of or adjudication as a delinquent juvenile or a youthful offender by reason of sexual offense, regardless of the date of offense or date of conviction or adjudication.

"Mental abnormality", a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

"Personality disorder", a congenital or acquired physical or mental condition that results in a general lack of power to control sexual impulses.

"Qualified examiner", a physician who is licensed pursuant to section two of chapter one hundred and twelve who is either certified in psychiatry by the American Board of Psychiatry

A.1

and Neurology or eligible to be so certified, or a psychologist who is licensed pursuant to sections one hundred and eighteen to one hundred and twenty-nine, inclusive, of chapter one hundred and twelve; provided, however, that the examiner has had two years of experience with diagnosis or treatment of sexually aggressive offenders and is designated by the commissioner of correction. A "qualified examiner" need not be an employee of the department of correction or of any facility or institution of the department.

"Sexual offense", includes any of the following crimes: indecent assault and battery on a child under fourteen under the provisions of section thirteen B of chapter two hundred and sixty-five; aggravated indecent assault and battery on a child under the age of 14 under section 13B1/2 of chapter 265; a repeat offense under section 13B3/4 of chapter 265; indecent assault and battery on a mentally retarded person under the provisions of section thirteen F of chapter two hundred and sixty-five; indecent assault and battery on a person who has obtained the age of fourteen under the provisions of section thirteen H of chapter two hundred and sixty-five; rape under the provisions of section twenty-two of chapter two hundred and sixty-five; rape of a child under sixteen with force under the provisions of section twenty-two A of chapter two hundred and sixty-five; aggravated rape of a child under 16 with force under section 22B of chapter 265; a repeat offense under section 22C of chapter 265; rape and abuse of a child under sixteen under the provisions of section twenty-three of chapter two hundred and sixty-five; aggravated rape and abuse of a child under section 23A of chapter 265; a repeat offense under section 23B of chapter 265; assault with intent to commit rape under the provisions of section twenty-four of chapter two hundred and sixty-five; assault on a child with intent to commit rape under section 24B of chapter 265; kidnapping under section 26 of said chapter 265 with intent to commit a violation of section 13B, 13B1/2, 13B3/4, 13F, 13H, 22, 22A, 22B, 22C, 23, 23A, 23B, 24 or 24B of said chapter 265; enticing away a person for prostitution or sexual intercourse under section 2 of chapter 272; drugging persons for sexual intercourse under section 3 of chapter 272; inducing a person under 18 into prostitution under section 4A of said chapter 272; living off or sharing earnings of a minor prostitute under section 4B of said chapter 272; open and gross lewdness and lascivious behavior under section 16 of said chapter 272; incestuous intercourse under section 17 of said chapter 272 involving a person under the age of 21; dissemination or possession with the intent to disseminate to a minor matter harmful to a minor under section 28 of said chapter 272; posing or exhibiting a child in a state of nudity under section 29A of said chapter 272; dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; purchase or possession of visual material of a child depicted in sexual conduct under section 29C of said chapter 272; dissemination of visual material of a child in the state of nudity or in sexual conduct under section 30D of chapter 272; unnatural and lascivious acts with a child under the age of sixteen under the provisions of section thirty-five A of chapter two hundred and seventy-two; accosting or annoying persons of the opposite sex and lewd, wanton and lascivious speech

A.2

or behavior under section 53 of said chapter 272; and any attempt to commit any of the above listed crimes under the provisions of section six of chapter two hundred and seventy-four or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority; and any other offense, the facts of which, under the totality of the circumstances, manifest a sexual motivation or pattern of conduct or series of acts of sexually -motivated offenses.

"Sexually dangerous person", any person who has been (i) convicted of or adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility; (ii) charged with a sexual offense and was determined to be incompetent to stand trial and who suffers from a mental abnormality or personality disorder which makes such person likely to engage in sexual offenses if not confined to a secure facility; or (iii) previously adjudicated as such by a court of the commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any victim under the age of 16 years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires.

A.3

Print

PART I ADMINISTRATION OF THE GOVERNMENT

TITLE XVII PUBLIC WELFARE

CHAPTER 123A CARE, TREATMENT AND REHABILITATION OF SEXUALLY DANGEROUS PERSONS

Section 12 Notification of persons adjudicated as delinquent juvenile or youthful offender by reason of a sexual offense; petitions for classification as sexually dangerous person; hearings

Section 12. (a) Any agency with jurisdiction of a person who has ever been convicted of or adjudicated as a delinquent juvenile or a youthful offender by reason of a sexual offense as defined in section 1, regardless of the reason for the current incarceration, confinement or commitment, or who has been charged with such offense but has been found incompetent to stand trial, or who has been charged with any offense, is currently incompetent to stand trial and has previously been convicted of or adjudicated as a delinquent juvenile or a youthful offender by reason of a sexual offense, shall notify in writing the district attorney of the county where the offense occurred and the attorney general six months prior to the release of such person, except that in the case of a person who is returned to prison for no more than six months as a result of a revocation of parole or who is committed for no more than six months, such notice shall be given as soon as practicable following such person's admission to prison. In such notice, the agency with jurisdiction shall also identify those prisoners or youths who have a particularly high likelihood of meeting the criteria for a sexually dangerous person.

(b) When the district attorney or the attorney general determines that the prisoner or youth in the custody of the department of youth services is likely to be a sexually dangerous person as defined in section 1, the district attorney or the attorney general at the request of the district attorney may file a petition alleging that the prisoner or youth is a sexually dangerous person and stating sufficient facts to support such allegation in the superior court where the prisoner or youth is committed or in the superior court of the county where the sexual offense occurred.

(c) Upon the filing of a petition under this section, the court in which the petition was filed shall determine whether probable cause exists to believe that the person named in the petition is a sexually dangerous person. Such person shall be provided with notice of, and an opportunity to appear in person at, a hearing to contest probable cause.

(d) At the probable cause hearing, the person named in the petition shall have the following rights:

A.4

(1) to be represented by counsel;

(2) to present evidence on such person's behalf;

(3) to cross-examine witnesses who testify against such person; and

(4) to view and copy all petitions and reports in the court file.

(e) If the person named in the petition is scheduled to be released from jail, house of correction, prison or a facility of the department of youth services at any time prior to the court's probable cause determination, the court, upon a sufficient showing based on the evidence before the court at that time, may temporarily commit such person to the treatment center pending disposition of the petition. The person named in the petition may move the court for relief from such temporary commitment at any time prior to the probable cause determination.

Print

PART I ADMINISTRATION OF THE GOVERNMENT

TITLE XVII PUBLIC WELFARE

CHAPTER 123A CARE, TREATMENT AND REHABILITATION OF SEXUALLY DANGEROUS PERSONS

Section 13 Temporary commitment of prisoner or youth to treatment center; right to counsel; psychological examination

Section 13. (a) If the court is satisfied that probable cause exists to believe that the person named in the petition is a sexually dangerous person, the prisoner or youth shall be committed to the treatment center for a period not exceeding 60 days for the purpose of examination and diagnosis under the supervision of two qualified examiners who shall, no later than 15 days prior to the expiration of said period, file with the court a written report of the examination and diagnosis and their recommendation of the disposition of the person named in the petition.

(b) The court shall supply to the qualified examiners copies of any juvenile and adult court records which shall contain, if available, a history of previous juvenile and adult offenses, previous psychiatric and psychological examinations and such other information as may be pertinent or helpful to the examiners in making the diagnosis and recommendation. The district attorney or the attorney general shall provide a narrative or police reports for each sexual offense conviction or adjudication as well as any psychiatric, psychological, medical or social worker records of the person named in the petition in the district attorney's or the attorney general's possession. The agency with jurisdiction over the person named in the petition shall provide such examiners with copies of any incident reports arising out of the person's incarceration or custody.

(c) The person named in the petition shall be entitled to counsel and, if indigent, the court shall appoint an attorney. All written documentation submitted to the two qualified examiners shall also be provided to counsel for the person named in the petition and to the district attorney and attorney general.

(d) Any person subject to an examination pursuant to the provisions of this section may retain a psychologist or psychiatrist who meets the requirements of a qualified examiner, as defined in section 1, to perform an examination on his behalf. If the person named in the petition is indigent, the court shall provide for such qualified examiner.

A. 6

Print

PART I ADMINISTRATION OF THE GOVERNMENT

TITLE XVII PUBLIC WELFARE

CHAPTER 123A CARE, TREATMENT AND REHABILITATION OF SEXUALLY DANGEROUS PERSONS

Section 14 Trial by jury; right to counsel; admissibility of evidence; commitment to treatment; temporary commitments pending disposition of petitions

Section 14. (a) The district attorney, or the attorney general at the request of the district attorney, may petition the court for a trial. In any trial held pursuant to this section, either the person named in the petition or the petitioning party may demand, in writing, that the case be tried to a jury and, upon such demand, the case shall be tried to a jury. Such petition shall be made within 14 days of the filing of the report of the two qualified examiners. If such petition is timely filed within the allowed time, the court shall notify the person named in the petition and his attorney, the district attorney and the attorney general that a trial by jury will be held within 60 days to determine whether such person is a sexually dangerous person. The trial may be continued upon motion of either party for good cause shown or by the court on its own motion if the interests of justice so require, unless the person named in the petition will be substantially prejudiced thereby. The person named in the petition shall be confined to a secure facility for the duration of the trial.

(b) The person named in the petition shall be entitled to the assistance of counsel and shall be entitled to have counsel appointed if he is indigent in accordance with section 2 of chapter 211D. In addition, the person named in the petition may retain experts or professional persons to perform an examination on his behalf. Such experts or professional persons shall be permitted to have reasonable access to such person for the purpose of the examination as well as to all relevant medical and psychological records and reports of the person named in the petition. If the person named in the petition is indigent under said section 2 of said chapter 211D, the court shall, upon such person's request, determine whether the expert or professional services are necessary and shall determine reasonable compensation for such services. If the court so determines, the court shall assist the person named in the petition in obtaining an expert or professional person to perform an examination and participate in the trial on such person's behalf. The court shall approve payment for such services upon the filing of a certified claim for compensation supported by a written statement specifying the time expended, services rendered, expenses incurred and compensation received in the same case or for the same services from any other source. The court shall inform the person named in the petition of his rights under this section before the trial commences. The person named in the petition shall be entitled to have process issued from the court to compel the attendance of witnesses on his behalf. If such person intends to rely upon the testimony or

report of his qualified examiner, the report must be filed with the court and a copy must be provided to the district attorney and attorney general no later than ten days prior to the scheduled trial.

(c) Juvenile and adult court probation records, psychiatric and psychological records and reports of the person named in the petition, including the report of any qualified examiner, as defined in section 1, and filed under this chapter, police reports relating to such person's prior sexual offenses, incident reports arising out of such person's incarceration or custody, oral or written statements prepared for and to be offered at the trial by the victims of the person who is the subject of the petition and any other evidence tending to show that such person is or is not a sexually dangerous person shall be admissible at the trial if such written information has been provided to opposing counsel reasonably in advance of trial.

(d) If after the trial, the jury finds unanimously and beyond a reasonable doubt that the person named in the petition is a sexually dangerous person, such person shall be committed to the treatment center or, if such person is a youth who has been adjudicated as a delinquent, to the department of youth services until he reaches his twenty-first birthday, and then to the treatment center for an indeterminate period of a minimum of one day and a maximum of such person's natural life until discharged pursuant to the provisions of section 9. The order of commitment, which shall be forwarded to the treatment center and to the appropriate agency with jurisdiction, shall become effective on the date of such person's parole or in all other cases, including persons sentenced to community parole supervision for life pursuant to section 133C of chapter 127, on the date of discharge from jail, the house of correction, prison or facility of the department of youth services.

(e) If the person named in the petition is scheduled to be released from jail, house of correction, prison or a facility of the department of youth services at any time prior to the final judgment, the court may temporarily commit such person to the treatment center pending disposition of the petition.

Rule 12. PLEAS AND WITHDRAWALS OF PLEAS

(Applicable to cases initiated on or after September 7, 2004)

(a) Entry of Pleas.

(1) Pleas Which May Be Entered and by Whom. A defendant may plead not guilty, or guilty, or with the consent of the judge, nolo contendere, to any crime with which the defendant has been charged and over which the court has jurisdiction. A plea of guilty or nolo contendere shall be received only from the defendant personally except pursuant to the provisions of Rule 18. Pleas shall be received in open court and the proceedings shall be recorded. If a defendant refuses to plead or if the judge refuses to accept a plea of guilty or nolo contendere, a plea of not guilty shall be entered.

(2) Admission to Sufficient Facts. In a District Court, a defendant may, after a plea of not guilty, admit to sufficient facts to warrant a finding of guilty.

(3) Acceptance of Plea of Guilty, a Plea of Nolo Contendere, or an Admission to Sufficient Facts. A judge may refuse to accept a plea of guilty or a plea of nolo contendere or an admission to sufficient facts. The judge shall not accept such a plea or admission without first determining that it is made voluntarily with an understanding of the nature of the charge and the consequences of the plea or admission.

(b) Plea Conditioned Upon an Agreement.

(1) Formation of Agreement; Substance. The defendant and defense counsel or the defendant when acting pro se may engage in discussions with the prosecutor as to any recommendation to be made to a judge or any other action to be taken by the prosecutor upon the tender of a plea of guilty or nolo contendere to a charged offense or to a lesser included offense. The agreement of the prosecutor may include:

(A) Charge Concessions.

(B) Recommendation of a particular sentence or type of punishment with the specific understanding that the recommendation shall not be binding upon the court.

(C) Recommendation of a particular sentence or type of punishment which may also include the specific understanding that the defendant shall reserve the right to request a lesser sentence or different type of punishment.

(D) A general recommendation of incarceration without regard to a specific term or institution.

(E) Recommendation of a particular disposition other than incarceration.

(F) Agreement not to oppose the request of the defendant for a particular sentence or other disposition.

(G) Agreement to make no recommendation or to take no action.

(H) Any other type of agreement involving recommendations or actions.

(2) Notice of Agreement. If defense counsel or the prosecutor has knowledge of any agreement that was made contingent upon the defendant's plea, he or she shall inform the judge thereof prior to the tender of the plea.

(c) Guilty Plea Procedure. After being informed that the defendant intends to plead guilty or nolo contendere:

(1) Inquiry. The judge shall inquire of the defendant or defense counsel as to the existence of and shall be informed of the substance of any agreements that are made which are contingent upon the plea.

(2) Recommendation as to Sentence or Disposition.

(A) Contingent Pleas. If there were sentence recommendations contingent upon the tender of the plea, the judge shall inform the defendant that the court will not impose a sentence that exceeds the

terms of the recommendation without first giving the defendant the right to withdraw the plea.

(B) Disposition Requested by Defendant. In a District Court, if the plea is not conditioned on a sentence recommendation by the prosecutor, the defendant may request that the judge dispose of the case on any terms within the court's jurisdiction. The judge shall inform the defendant that the court will not impose a disposition that exceeds the terms of the defendant's request without first giving the defendant the right to withdraw the plea.

(3) Notice of Consequences of Plea. The judge shall inform the defendant on the record, in open court:

(A) that by a plea of guilty or nolo contendere, or an admission to sufficient facts, the defendant waives the right to trial with or without a jury, the right to confrontation of witnesses, the right to be presumed innocent until proved guilty beyond a reasonable doubt, and the privilege against self-incrimination;

(B) where appropriate, of the maximum possible sentence on the charge, and where appropriate, the possibility of community parole supervision for life; of any different or additional punishment based upon subsequent offense or sexually dangerous persons provisions of the General Laws, if applicable; where applicable, that the defendant may be required to register as a sex offender; and of the mandatory minimum sentence, if any, on the charge;

(C) that if the defendant is not a citizen of the United States, the guilty plea, plea of nolo contendere or admission may have the consequence of deportation, exclusion of admission, or denial of naturalization.

(4) Tender of Plea. The defendant's plea or admission shall then be tendered to the court.

(5) Hearing on Plea; Acceptance. The judge shall conduct a hearing to determine the voluntariness of the plea or admission and the factual basis of the charge.

(A) Factual Basis for Charge. A judge shall not accept a plea of guilty unless the judge is satisfied that there is a factual basis for the charge. The failure of the defendant to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea. Upon a showing of cause the tender of the guilty plea and the acknowledgment of the factual basis of the charge may be made on the record at the bench.

(B) Acceptance. At the conclusion of the hearing the judge shall state the court's acceptance or rejection of the plea or admission.

(C) Sentencing. After acceptance of a plea of guilty or nolo contendere or an admission, the judge may proceed with sentencing.

(6) Refusal to Accept an Agreed Sentence Recommendation. If the judge determines that the court will impose a sentence that will exceed an agreed recommendation for a particular sentence or type of punishment under subdivision (b)(1)(C) of this rule, an agreed recommendation for a particular disposition other than incarceration under subdivision (b)(1)(E), or a request for disposition in a District Court by the defendant under subdivision (c)(2)(B), after having informed the defendant as provided in subdivision (c)(2) that the court would not do so, the judge shall, on the record, advise the defendant personally in open court or on a showing of cause, in camera, that the judge intends to exceed the terms of the plea recommendation or request for disposition and shall afford the defendant the opportunity to then withdraw the plea or admission. The judge may indicate to the parties what sentence the judge would impose.

(d) Deleted.

(e) Availability of Criminal Record and Presentence Report. The criminal record of the defendant shall be made available. Upon the written motion of either party made at the tender of a plea of guilty or nolo contendere, the presentence report as described in subdivision (d)(2) of Rule 28 shall be made available to the prosecutor and counsel for the defendant for inspection. In extraordinary cases, the judge may

except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. If the report is not made fully available, the portions thereof which are not disclosed shall not be relied upon in determining sentence. No party may make any copy of the presentence report.

(f) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this subdivision, evidence of a plea of guilty, or a plea of nolo contendere, or an admission, or of an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, later withdrawn, or statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceedings against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, or a plea of nolo contendere, or an admission or an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, is admissible in a criminal proceeding for perjury if the statement was made by the defendant under oath, on the record, and in the presence of counsel, if any.

Massachusetts Criminal Procedure Rule 30: Postconviction Relief

[Disclaimer]

(a) Unlawful Restraint. Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

(b) New Trial. The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

(c) Post Conviction Procedure.

(1) Service and Notice. The moving party shall serve the office of the prosecutor who represented the Commonwealth in the trial court with a copy of any motion filed under this rule.

(2) Waiver. All grounds for relief claimed by a defendant under subdivisions (a) and (b) of this rule shall be raised by the defendant in the original or amended motion. Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.

(3) Affidavits. Moving parties shall file and serve and parties opposing a motion may file and serve affidavits where appropriate in support of their respective positions. The judge may on rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.

(4) Discovery. Where affidavits filed by the moving party under subdivision (c)(3) establish a prima facie case for relief, the judge on motion of any party, after notice to the opposing party and an opportunity to be heard, may authorize such discovery as is deemed appropriate, subject to appropriate protective order.

(5) Counsel. The judge in the exercise of discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under subdivisions (a) and (b) of this rule. The court, after notice to the Commonwealth and an opportunity to be heard, may also exercise discretion to allow the defendant costs associated with the preparation and presentation of a motion under this rule.

A.14

(6) Presence of Moving Party. A judge may entertain and determine a motion under subdivisions (a) and (b) of this rule without requiring the presence of the moving party at the hearing.

(7) Place and Time of Hearing. All motions under subdivisions (a) and (b) of this rule may be heard by the trial judge wherever the judge is then sitting. The parties shall have at least 30 days notice of any hearing unless the judge determines that good cause exists to order the hearing held sooner.

(8) Appeal. An appeal from a final order under this rule may be taken to the Appeals Court, or to the Supreme Judicial Court in an appropriate case, by either party.

(A) If an appeal is taken, the defendant shall not be discharged from custody pending final decision upon the appeal; provided, however, that the defendant may, in the discretion of the judge, be admitted to bail pending decision of the appeal.

(B) If an appeal or application therefor is taken by the Commonwealth, upon written motion supported by affidavit, the Appeals Court or the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court after entry of the rescript or the denial of the application. If the final order grants relief other than a discharge from custody, the trial court or the court in which the appeal is pending may, upon application by the Commonwealth, in its discretion, and upon such conditions as it deems just, stay the execution of the order pending final determination of the matter.

(9) Appeal Under G. L. c. 278, § 33E. If an appeal or application for leave to appeal is taken by the Commonwealth under the provisions of Chapter 278, Section 33E, upon written notice supported by affidavit, the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees to be paid on order of the trial court after entry of the rescript or the denial of the application.

« Previous Rule Next Rule »

A. 15

78 Mass.App.Ct. 1119, 939 N.E.2d 803 (Table), 2011 WL 93059 (Mass.App.Ct.)
Unpublished Disposition
Briefs and Other Related Documents
Judges and Attorneys
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Appeals Court of Massachusetts.
COMMONWEALTH
v.
Edward D. DAVIS.

No. 09-P-1464.
Jan. 11, 2011.

By the Court (GRASSO, SMITH & RUBIN, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** On November 18, 2002, the defendant pleaded guilty to multiple charges, including aggravated rape, indecent assault and battery, assault and battery by means of a dangerous weapon (a knife), and kidnaping, and was later sentenced to several concurrent terms of imprisonment of at least ten years. The charges arose from two separate incidents in which the defendant lured women into his apartment and violently assaulted them.

On April 21, 2009, the defendant filed a motion for a new trial seeking to withdraw his guilty plea, claiming that his plea was not intelligent and voluntary because both the judge and his attorney failed to advise him that he could be committed as a sexually dangerous person pursuant to G.L. c. 123A for one day to life after he had served his sentences. The defendant also claimed that his trial attorney was ineffective in a number of respects. The judge who had presided at the plea hearing summarily denied the motion without an evidentiary hearing. The defendant claims error.

Denial of the motion. "A postsentence motion to withdraw a plea is treated as a motion for a new trial." *Commonwealth v. Conaghan*, 433 Mass. 105, 106, 740 N.E.2d 956 (2000). The grant of a motion for a new trial is within the judge's discretion and "a rigorous standard must be applied and a judge may only allow such a motion 'if it appears that justice may not have been done.' " *Commonwealth v. Berrios*, 447 Mass. 701, 708, 856 N.E.2d 857 (2006), quoting from Mass.R.Crim.P. 30(b), 435 Mass. 1501 (2001). The defendant must come forward with a credible reason for withdrawing his plea that outweighs the risk of prejudice to the Commonwealth. *Commonwealth v. Murphy*, 73 Mass.App.Ct. 57, 67, 895 N.E.2d 764 (2008). The motion judge may decide the motion on the basis of an affidavit submitted in support of the motion, and is not required to believe the affidavits even if they are undisputed. *Commonwealth v. Pingaro*, 44 Mass.App.Ct. 41, 48, 693 N.E.2d 690 (1997).

a. *The claimed error in the plea colloquy.* During the plea colloquy, the judge asked the defendant, "Do you understand, sir, that by pleading guilty to this offense, the Commonwealth may move in a subsequent proceeding to have you declared a sexually dangerous person. Do you understand that?" The defendant replied, "Yes." The judge, however, failed to inform the defendant that the term of

A.16

commitment for a sexually dangerous person is one day to life.

We recognize that under Mass.R.Crim.P. 12(c)(3)(B), 378 Mass. 868 (1979), a judge "shall inform the defendant ... on the record, in open court ... where appropriate, ... of any different or additional punishment based upon ... sexually dangerous persons provisions of the General Laws, if applicable...." It is not disputed that the definition of a sexual offense under § 1 of G.L. c. 123A includes indecent assault and battery on a person who has attained the age of fourteen and also aggravated rape. Here, the defendant pleaded guilty to one count of indecent assault and battery and three counts of aggravated rape. Thus, the defendant pleaded guilty to offenses that constitute sexual offenses under G.L. c. 123A. In order for the Commonwealth to pursue sexually dangerousness proceedings against the defendant, however, the Commonwealth would not only have to show that he committed a sexual offense as defined by G.L. c. 123A, § 1, but also that, at the time of the proceedings, the defendant "suffers from a mental abnormality or personality disorder which makes [him] likely to engage in sexual offenses if not confined to a secure facility." G .L. c. 123A, § 1. There is nothing in this record that suggests the defendant meets that definition.

***2** Therefore, the possibility of sexually dangerous proceedings against the defendant is purely speculative at this point and we accordingly rule that whether any violation of Mass.R.Crim.P. 12 occurred requires no further analysis.

b. *Ineffective assistance of counsel claim.* At the plea hearing, the defendant responded to the judge's questions by asserting that he had not been threatened or promised anything in exchange for his plea, that he had sufficient time to consult with his counsel, and that his attorney had both fairly represented him and that his attorney has acted in his best interests. Nevertheless, in his motion to withdraw his guilty plea, the defendant claimed that his counsel was ineffective because he failed to (1) advise the defendant of all the consequences of his guilty pleas; (2) investigate and properly prepare a defense; (3) investigate the possibility of a recent contrivance or fabrication on the part of one of the victims; (4) explore possible deficiencies in the police investigation, and (5) argue against joinder. His present claims, thus "directly contradict his professions under oath at the time of [his pleas]." *Commonwealth v. Hiskin*, 68 Mass.App.Ct. 633, 640, 863 N.E.2d 978 (2007) Further, to support his claims, the defendant submitted a self-serving affidavit that was not signed. The plea judge was allowed to reject that affidavit. See *Commonwealth v. Lucien*, 440 Mass. 658, 672, 801 N.E.2d 247 (2004).

For those reasons and the reasons stated in the Commonwealth's brief, pages 30 through 42, we reject the defendant's claim that his counsel was constitutionally ineffective.

c. *The lifetime community parole sentence.* Although not raised by the defendant in his brief, we note that he was sentenced to lifetime community parole on count one of the indictment charging aggravated rape. On September 14, 2005, the Supreme Judicial Court decided *Commonwealth v. Pagan*, 445 Mass. 161, 170-174, 834 N.E.2d 240 (2005), therein determining that the sentencing procedures for imposing lifetime community parole were unconstitutionally vague.

Accordingly, the defendant's sentence on count one of the indictment is vacated and the matter is remanded for re-sentencing on that count. We affirm the denial of the defendant's motion to withdraw his guilty pleas to the remaining counts.

So ordered.

Mass.App.Ct.,2011.
Com. v. Davis
78 Mass.App.Ct. 1119, 939 N.E.2d 803 (Table), 2011 WL 93059 (Mass.App.Ct.)
Unpublished Disposition

Briefs and Other Related Documents (Back to top)

• 2010 WL 1746256 (Appellate Brief) Reply Brief for the Defendant -- Appellant Edward Davis (Mar. 12, 2010) : Original Image of this Document (PDF)

A.17

- 2010 WL 926877 (Appellate Brief) Brief & Appendix for the Commonwealth (Feb. 26, 2010)
- Original Image of this Document (PDF)
- 2009-P-1464 (Docket) (Jul. 27, 2009)

Judges and Attorneys (Back to top)

Judges

Judges

- **Rubin, Hon. Peter Jason**

Commonwealth of Massachusetts Appeals Court
Boston, Massachusetts 02108
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

END OF DOCUMENT

A.18

84 Mass.App.Ct. 1121, 997 N.E.2d 1222 (Table), 2013 WL 6164464 (Mass.App.Ct.)
Unpublished Disposition
Briefs and Other Related Documents
Judges and Attorneys
NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.
COMMONWEALTH
v.
Terry LENKOWSKI.

No. 12-P-1205.
November 25, 2013.

By the Court (KAFKER, VUONO & CARHART, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The defendant appeals from his conviction of operating a motor vehicle under the influence of intoxicating liquor, and from the order denying his motion for new trial. He alleges that trial counsel's failure to advise him that a guilty finding would result in the loss of his right to carry a firearm was ineffective assistance of counsel. He also alleges that admitting a small amount of marijuana found on his person at the time of his arrest resulted in an unfair trial and requires reversal. We affirm.

Background. The following evidence was presented at the jury-waived trial: On February 19, 2011, just after midnight, Officer D'Amico of the Northampton police department stopped the defendant as he was operating his vehicle on a public way. After administering field sobriety tests and observing the defendant's demeanor, Officer D'Amico formed the opinion that the defendant was under the influence of alcohol and placed the defendant under arrest. At the police station, during the booking process, Officer D'Amico removed a small plastic bag containing a green leafy substance from the defendant's person. Prior to trial, defense counsel moved in limine to prevent the Commonwealth from introducing evidence of the green leafy substance found on the defendant. That motion was denied. In his ruling, the judge stated that "the introduction of such evidence will go to the weight of such evidence as opposed to its admissibility." At trial, the Commonwealth played a videotape showing the initial contact between the officer and defendant, three of the field sobriety tests, and a portion of the booking process when the green leafy substance was found. Officer D'Amico testified that he identified the substance as marijuana.

After trial, the defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor, pursuant to G.L. c. 90, § 24. His license to carry a firearm was subsequently revoked as a result of his conviction, pursuant to G.L. c. 140, § 131(*d*)(i), (*f*). The defendant filed a timely notice of appeal. This court subsequently stayed the appeal and granted the defendant leave to file a motion for new trial. The defendant then moved for a new trial, alleging that trial counsel's failure to advise him of the collateral consequence of having his right to carry a firearm revoked in the event of a guilty finding amounted to ineffective assistance of counsel. That motion was denied and the defendant appealed. The defendant's direct appeal and his appeal from the order denying the motion for new trial were consolidated in this court.

Discussion. We review the denial of the defendant's motion for a new trial for "abuse of discretion or other error of law." *Commonwealth v. Wheeler*, 52 Mass.App.Ct. 631, 635 (2001). Neither party disputes that trial counsel did not inform the defendant that, as a collateral consequence of a guilty finding, his right to carry a firearm would be revoked. Indeed, in his findings and order on the motion for a new trial, the trial judge explicitly so found. The question then, is whether an attorney's failure to advise a client of the collateral consequence of revocation of a license to carry a firearm constitutes ineffective assistance of counsel. We conclude that it does not. The test for ineffective assistance of counsel asks whether counsel's performance fell "measurably below that which might be expected from an ordinary fallible lawyer" and "likely deprived the defendant of an otherwise available,

A.19

substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Ineffective assistance constitutes "prejudicial constitutional error" and, where found, warrants reversing the denial of a motion for a new trial. *Commonwealth v. Wheeler, supra* at 636.

***2** The defendant argues that his attorney was ineffective in failing to warn him of the collateral consequence of losing his firearms license and likens the issue in this case to the ruling in Padilla v. Kentucky, 559 U.S. 356 (2010). This argument lacks merit. In *Padilla,* the United States Supreme Court did not rule on the distinction between direct and collateral consequences, as its decision was limited to the "unique nature of deportation." *Id.* at 365. The defendant concedes that Massachusetts law distinguishes between direct and collateral consequences in assessing ineffective assistance claims. Simply stated, counsel was not ineffective in failing to advise the defendant of the collateral consequence of the revocation of his license to carry a firearm. See Commonwealth v. Indelicato, 40 Mass.App.Ct. 944, 945 (1996) (holding counsel was not ineffective for providing inaccurate advice about consequences of a guilty plea on defendant's firearms license because failure was not "grave and fundamental"); Commonwealth v. Shindell, 63 Mass.App.Ct. 503, 505–506 (2005) (holding counsel not ineffective for failing to inform defendant that guilty plea would require sex offender registration). The judge did not abuse his discretion in deciding that that the defendant did not receive ineffective assistance of counsel warranting a new trial.

The defendant also alleges reversible error in the admission of the green leafy substance, which the officer recognized as marijuana. An error is not prejudicial where it had no effect or a "very slight effect" on the decision maker.[FN1] See Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994). Both parties agree there was no evidence that the defendant consumed marijuana. Therefore, the judge could not have based his decision that the defendant was driving under the influence on the presence of marijuana on the defendant's person. Rather, the focus of this trial, as it should have been, was on whether the defendant was impaired by the consumption of alcohol. Thus, the admission of evidence that the defendant possessed a green leafy substance did not result in an unfair trial.

> FN1. We note that, because the evidence was irrelevant, the judge should have excluded it, or should have stated that the presence of marijuana on the defendant's person had no bearing on his finding.

Judgment affirmed.

Order denying the motion for new trial affirmed.

Mass.App.Ct.,2013.
Com. v. Lenkowski
84 Mass.App.Ct. 1121, 997 N.E.2d 1222 (Table), 2013 WL 6164464 (Mass.App.Ct.)
Unpublished Disposition

Briefs and Other Related Documents (Back to top)

- 2013 WL 1569103 (Appellate Brief) Brief for the Commonwealth (Mar. 25, 2013) Original Image of this Document (PDF)
- 2013 WL 957985 (Appellate Brief) Brief and Record Appendix for the Appellant (Feb. 26, 2013) Original Image of this Document (PDF)
- 2012-P-1205 (Docket) (Aug. 1, 2012)

Judges and Attorneys (Back to top)

Judges

Judges

- **Carhart, Hon. Judd J.**
Commonwealth of Massachusetts Appeals Court

A.20

Boston, Massachusetts 02108
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

END OF DOCUMENT

A.21

61 Mass.App.Ct. 1124, 814 N.E.2d 764 (Table), 2004 WL 2026814 (Mass.App.Ct.)
Unpublished Disposition
Briefs and Other Related Documents

Appeals Court of Massachusetts.
COMMONWEALTH,
v.
Courtney LYNCH.[FN1]

FN1. In a police report, the defendant is said to have revealed his name to be Courtney Gould. (R. 18) Nonetheless, we refer to the defendant as his name appears on the complaint.

No. 03-P-182.
Sept. 10, 2004.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 The defendant appeals from an order denying his motion to withdraw his guilty plea to a complaint charging indecent assault and battery on a child under the age of fourteen. He contends that (1) his plea was not intelligently made because he was not informed he might be subject to future, separate proceedings pursuant to G.L. c. 123A, potentially leading to a determination that he was a sexually dangerous person; and (2) defense counsel was ineffective in not marshaling an adequate defense.

The plea hearing reflects that the judge did not adhere to the provision in Mass.R.Crim.P. 12(c)(3)(B), as amended, 399 Mass. 1215 (1987), which directs that a defendant shall be informed, inter alia, "of any different or additional punishment based upon second offense or sexually dangerous persons provisions of the General Laws, if applicable...." We determine that, in the circumstances of this case, this point of nonconformance with rule 12(c)(3)(B), neither rendered the plea involuntary, nor indicated that the plea was not knowingly and intelligently entered by the defendant. See *Commonwealth v. Albert A.*, 49 Mass.App.Ct. 269, 271, 729 N.E.2d 312 (2000). Furthermore, the omission of a rule 12(c)(3)(B) reference to the prospect of future G.L. c. 123A, proceedings does not per se render a defendant's plea invalid. See *Commonwealth v. Rodriquez*, 52 Mass.App.Ct. 572, 580, 755 N.E.2d 753 (2001) ("We will not assume that the defendant's plea was involuntary and unknowing and say as a matter of law that justice was not done simply because the record reflects noncompliance with rule 12").

We note that the defendant was informed prior to his plea that he would be subject to sex offender registration requirements and would need to submit a deoxyribonucleic acid (DNA) sample within ninety days.[FN2] He chose to plead guilty in light of these requirements. We also consider the lenient sentence the defendant received. Facing a possible thirty month incarceration (or a ten year sentence were the case prosecuted in the Superior Court), the defendant instead was ordered to serve just nine months, with a balance of twenty-one months suspended.

FN2. Involuntary commitment, of course, is a more severe consequence than sex offender registration. At the same time, for this defendant, the sex offender registration requirement was a certainty, while involuntary commitment was merely a possible consequence after lengthy postconviction proceedings under c. 123A.

That a defendant may be subject to trial and adjudication as a sexually dangerous person is a collateral consequence of a plea to a criminal offense. See *Commonwealth v. Morrow*, 363 Mass. 601,

A.22

606, 296 N.E.2d 468 (1973); *Opinion of the Justices,* 423 Mass. 1201, 1231, 668 N.E.2d 738 (1996). Accord *Steele v. Murphy,* 635 F.3d 14, 17 (1st Cir.2004). In *Steele,* the United States Court of Appeals for the First Circuit, in habeas corpus review of a Massachusetts defendant's plea conviction, found no constitutional flaw notwithstanding an omission in the plea colloquy (similar to this case), in which the defendant was not informed of the potential of G.L. c. 123A, sexually dangerous person proceedings. That court, applying Federal standards, consistent with our determinations under Massachusetts law, deemed omission of the reference to c. 123A proceedings a collateral consequence of the plea. That court reasoned:

***2** "[t]he possibility of commitment for life as a sexually dangerous person is a collateral consequence of pleading guilty. As a result, the failure to inform Steele about the possibility of being classified as a sexually dangerous person did not violate clearly established Supreme Court precedent established in *Brady.* See, e.g., *George v. Black,* 732 F.2d 108, 110 (8th Cir.1984) (possibility that convicted sex offender could be confined pursuant to civil commitment proceedings after expiration of criminal sentence was collateral consequence); *Cuthrell v. Dir., Patuxent Inst.,* 475 F.2d 1364, 1367 (4th Cir.1973) (possibility of civil commitment was collateral consequence)." FN3

FN3. The Federal court cited Mass.R.Crim.P. 12(c)(3)(B), but concluded that "failure to follow this state procedural rule does not affect our analysis of [the defendant's] Steele's federal constitutional claim." 635 F.3d at 18 n. 2.

Ibid.

The defendant's appellate challenge relying on G.L. c. 278, § 29D,-which allows a defendant to withdraw his guilty plea if he was not warned of certain possible immigration consequences-is not availing. Rule 12 contains no provision entitling a defendant to withdraw his plea, and in this respect rule 12 may be contrasted with the mandatory warning relating to immigration consequences, and which is specifically provided by statute and which may form the basis for the withdrawal of a plea.

Finally, the defendant claims his counsel was ineffective for "failing to make any preparations for trial." (D. Brief at 21) But, the strategic steps suggested by appellate counsel-for example, a motion for a "taint" hearing, see *Commonwealth v. Allen,* 40 Mass.App.Ct. 458, 462, 665 N.E.2d 105 (1996)-fail to take into account the strength of the Commonwealth's evidence, quite apart from the victim's statements. After receiving Miranda warnings, the defendant made incriminating statements to the police, and the victim's mother overheard the defendant tell the victim not to tell anyone or he would get in trouble. In response to a statement by the victim's mother that she wanted to talk to the defendant about "something," the defendant immediately responded, "I didn't do anything. I didn't touch her." In short, the evidence was strong, and counsel was not ineffective for advising the defendant to opt for a "capped" plea, as opposed to preparing for a trial, the results of which could have been of far greater consequence.

Order denying motion to withdraw guilty plea affirmed.

Mass.App.Ct.,2004.
Com. v. Lynch
61 Mass.App.Ct. 1124, 814 N.E.2d 764 (Table), 2004 WL 2026814 (Mass.App.Ct.)
Unpublished Disposition

Briefs and Other Related Documents (Back to top)

- 2003 WL 23940975 (Appellate Brief) Brief and Appendix for the Commonwealth (Jul. 3, 2003)
- 2003-P-0182 (Docket) (Feb. 06, 2003)

END OF DOCUMENT

A.23

71 Mass.App.Ct. 1103, 878 N.E.2d 582 (Table), 2008 WL 90163 (Mass.App.Ct.)
Unpublished Disposition
Briefs and Other Related Documents
NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.
COMMONWEALTH,
v.
Pedro PEREZ.

No. 07-P-215.
Jan. 9, 2008.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 On March 25, 2004, the defendant, Pedro Perez, pleaded guilty in the Superior Court to four armed robberies, see G.L. c. 265, § 17, two assaults by means of a dangerous weapon, see G.L. c. 265, § 15B(*b*), and one count of indecent assault and battery on a person over the age of fourteen, see G.L. c. 265, § 13H.[FN1] With respect to the count charging him with indecent assault and battery, the charge on which the present appeal turns, he was sentenced to a prison term of four to five years to be served concurrently with a sentence imposed on certain of the armed robbery counts.

FN1. The offenses were set forth in two indictments, one containing five counts, the other containing two counts.

On December 15, 2006, the defendant filed a motion for a new trial seeking to withdraw his plea with respect to the five counts set forth in the first indictment, including the indecent assault and battery charge.[FN2] He filed no accompanying affidavit. See Mass.R.Crim.P. 30(c)(3), as appearing in 435 Mass. 1501 (2001); *Commonwealth v. Sherman*, 68 Mass.App.Ct. 797, 799-800 (2007). The essence of the defendant's claim is that his plea was not intelligent and voluntary because he was not advised that a conviction of indecent assault and battery could subject him to proceedings under G.L. c. 123A, the sexually dangerous person law, upon the completion of his sentence. See Mass.R.Crim.P. 12(c)(3)(B), 378 Mass. 868 (1979) (applicable to indictments returned before September 7, 2004) (where appropriate, defendant to be informed at time of plea "of any different or additional punishment based upon second offense or sexually dangerous persons provisions of the General Laws"). The judge who had presided at the plea hearing denied the motion on January 18, 2007.

FN2. The motion did not address the two counts of the second indictment. The defendant had received probation on those charges.

On February 22, 2007, the defendant filed a motion for reconsideration, this time with an affidavit stating that "[h]ad I been informed of the civil commitment consequence associated with a plea of guilty to the Indecent A & B charge, I would not have pled guilty to the charges against me and would have instead, invoked my constitutionally guaranteed right to a jury trial." The judge denied the motion for reconsideration on the following day. The defendant filed timely notices of appeal from the orders denying his motions. Those appeals have been consolidated. We conclude that the defendant has not demonstrated that the absence of information regarding possible consequences under G.L. c. 123A rendered his plea unintelligent or involuntary, and we accordingly affirm the orders of the trial court.[FN3]

FN3. While the defendant's motion for a new trial seeks relief with respect to all of the five counts of the first indictment, and his subsequently filed affidavit asserts that, if properly informed, he would not have pleaded guilty to the charges, in the plural, his

A.24

brief on appeal focuses entirely on the indecent assault and battery charge. Given our disposition of the appeal, we need not determine precisely which pleas the defendant seeks to withdraw.

It cannot be disputed that a defendant's decision to plead guilty must be intelligent and voluntary. See *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Commonwealth v. Foster*, 368 Mass. 100, 103, 108 (1975). The defendant argues that a plea can be neither intelligent nor voluntary where he is unaware of the consequences of the plea. In this regard, he finds initial support in that portion of rule 12 that deals specifically with notice of the consequences of a plea and that requires, among other things, that a defendant be informed of any additional punishment [FN4] that might come his way pursuant to the Commonwealth's statutes governing sexually dangerous persons. See Mass.R.Crim.P. 12(c)(3)(B). From this he reasons that his ignorance of a collateral consequence of this magnitude means that his plea was not intelligent, and therefore also not voluntary.

FN4. Although the provisions of G.L. c. 123A have been held to be civil and remedial, rather than punitive, see *Commonwealth v. Bruno*, 432 Mass. 489, 499-502 (2000), we have no difficulty concluding that Mass.R.Crim.P. 12(c)(3)(B), which refers to notice of different or additional "punishment," encompasses notice of possible commitment consequences from being adjudicated a sexually dangerous person.

***2** We acknowledge the Commonwealth's procedural objections, including (1) that the defendant did not submit an affidavit with his motion for a new trial, thereby limiting himself to the transcript of the plea colloquy in order to make his case, see *Commonwealth v. Sherman*, 68 Mass.App.Ct. at 800; and (2) that his motion for reconsideration with its accompanying affidavit was not filed within the time allotted for filing an appeal from the order denying the original motion, see *Commonwealth v. Balboni*, 419 Mass. 42, 43 (1994). We need not pause to reflect on these contentions because, assuming that all procedural conflicts are resolved in the defendant's favor, and taking into consideration the averments of his affidavit, we nevertheless conclude on the merits that the judge did not abuse his discretion in denying the motion for a new trial.

It is not disputed that, in the course of the plea colloquy, the judge did not notify the defendant of possible consequences under the sexually dangerous person statute as called for by rule 12(c)(3)(B). This by itself is not a ground for invalidating the plea. Certain specifics mandated by the rule, including that the defendant be informed of possible consequences under G.L. c. 123A, are not a product of constitutional requirements. See *Commonwealth v. Nolan*, 16 Mass.App.Ct. 994, 994 (1983). "The real issue in cases like the present one is whether a waiver was knowingly and voluntarily made." *Commonwealth v. Stanton*, 2 Mass.App.Ct. 614, 620 (1974). A departure from the requirements of the rule is a factor that may have weight in determining whether a plea was knowing and voluntary, see *Commonwealth v. Johnson*, 11 Mass.App.Ct. 835, 841 (1981), but such departure alone does not require a finding that justice may not have been done. See Mass.R.Crim.P. 30(b), as appearing in 435 Mass. 1501 (2001); *Commonwealth v. Nolan*, 16 Mass.App.Ct. at 995. For a complete analysis of the interaction between the constitutional requirement that a valid plea be knowing and voluntary and the mandates of court rules applicable to plea colloquies, see the opinion of Justice Kaplan in the later *Commonwealth v. Nolan*, 19 Mass.App.Ct. 491, 494-501 (1985).

The defendant has the burden of demonstrating that it would work an injustice to deny him a withdrawal of his plea. See *Commonwealth v. Rodriguez*, 52 Mass.App.Ct. 572, 581 (2001). "A judge should allow a postsentence motion to withdraw a guilty plea only if the defendant comes forward with a credible reason for withdrawing the plea that outweighs the risk of prejudice to the Commonwealth." *Ibid.*, citing *Commonwealth v. DeMarco*, 387 Mass. 481, 486 (1982). We are satisfied that the record shows that the plea in this case was a knowing and voluntary act on the part of the defendant, see *Boykin v. Alabama*, 395 U.S. at 242-243, and the defendant has presented nothing that persuades us otherwise.

At the time of submission of his plea, the defendant was represented by counsel. See

A.25

Commonwealth v. Russell, 37 Mass.App.Ct. 152, 157 (1994). During the plea colloquy, he agreed that he had discussed the case fully with his counsel, including "possible consequences of this guilty plea." That there is no affidavit from his plea counsel supporting the defendant's allegation that he was left in the dark regarding possible sexually dangerous person exposure is also entitled to weight in determining whether the defendant's allegation should be credited. See *Commonwealth v. Goodreau*, 442 Mass. 341, 354 (2004); *Commonwealth v. Thurston*, 53 Mass.App.Ct. 548, 553-554 (2002). The judge was not obligated to believe the otherwise unsubstantiated statement of the defendant in his affidavit that, had he known of the possible consequences under G.L. c. 123A, he would have insisted on a trial. See *Commonwealth v. Pingaro*, 44 Mass.App.Ct. 41, 53 (1997).

***3** We observe also that the defendant received a favorable sentence given the nature of his offenses, a factor that also weighs in any consideration of his understanding and purpose in submitting a plea. See *Commonwealth v. Hiskin*, 68 Mass.App.Ct. 633, 642 (2007). In addition, we agree with the Commonwealth that, given the defendant's record and the nature of his offenses, it is highly unlikely that he would be considered a sexually dangerous person as defined in G.L. c. 123A, § 1. This being the case, the possibility of future proceedings under that statute was sufficiently remote that it would have made no difference in any reasonable calculation regarding the wisdom of a guilty plea. See *Commonwealth v. Correa*, 43 Mass.App.Ct. 714, 718 (1997); *Commonwealth v. Shindell*, 63 Mass.App.Ct. 503, 505 n. 3 (2005).

For all these reasons, there is no basis on which to conclude that the defendant's plea was not knowing and voluntary, and accordingly the judge did not abuse his discretion in refusing to permit a withdrawal.

Order denying motion for new trial affirmed.

Order denying motion for reconsideration affirmed.

Mass.App.Ct.,2008.
Com. v. Perez
71 Mass.App.Ct. 1103, 878 N.E.2d 582 (Table), 2008 WL 90163 (Mass.App.Ct.)
Unpublished Disposition

Briefs and Other Related Documents (Back to top)

- 2007 WL 1786500 (Appellate Brief) Brief and Appendix for the Commonwealth (May 2007)
- 2007 WL 1453954 (Appellate Brief) Brief and Record Appendix for the Defendant on Appeal from the Plymouth County Superior Court (Apr. 2007)
- 2007-P-0215 (Docket) (Feb. 12, 2007)

END OF DOCUMENT

A. 26

Certificate Pursuant to Mass. R. App. P. 16(k)

I, Carolyn A. Burbine, do hereby certify that the Commonwealth's brief in the case of Commonwealth v. Joseph L. Roberts Appeals Court No. 2014-P-0734, complies with Mass. R.A.P. 16(k).

Signed under the pains and penalties of perjury.

Carolyn A. Burbine

CAROLYN A. BURBINE
Assistant District Attorney
For the Plymouth District

Date: October 20, 2014